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In the Supreme Court of the United States

OCTOBER TERM 1943.

No. 789-791

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit,
MOTION RE TRANSCRIPT OF RECORD,
and
BRIEF IN SUPPORT OF PETITION.

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E. G. BLUE, *et al.*,
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EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, E. G. Blue, William N. Clark, Willard S. Holcombe, Dan S. Riggle, Byron L. McClure, Carl A. Bemman, George F. Buck, Earl Pardee, George E. Reinwald, W. Hal Marshall, A. L. Malott, Earl L. Holliday, S. F. Neidigh, R. C. Deck and Hiram Berry respectfully show as grounds for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners, all salesmen, were licensed as Cemetery salesmen by the State of Ohio, to sell cemetery sections, in the cemeteries hereinafter named. They sold the sections through Forest Glen, Inc., a corporation formed by Robert Marshall as a development and sales organization. They

were not stockholders, officers or directors of Forest Glen, Inc., and had nothing to do with the bookkeeping, etc. Forest Glen, Inc. made a contract with each of the cemeteries herein named (Gov't. Exs. 5228-5230 Incl., pp. 3153-3156 Transcript), through the Trustees of each cemetery, that it would convey or cause to be conveyed, land to each cemetery, free and clear, provided, Forest Glen, Inc. would have the right to build and develop each of such cemeteries and sell sections in such cemeteries for the purpose of securing money for development purposes. Out of the proceeds of such sales, 10% was to be given each cemetery as a perpetual care fund. This was done. The other 90% was to belong to Forest Glen, Inc. Out of that 90% was to be paid the cost of development, advertising, salesmen commissions, payments to investors and all other expenses. When the cemeteries were completely built and paid for, then the cemeteries were to become the absolute property of lot owners—held for them by the Trustees. Forest Glen Inc. had agreed to maintain a sales organization known as wholesale and retail, until such cemeteries were paid for and completely developed. *The deeds from all sections whether made at retail or wholesale, provided that the sections could be used only for the burial of the dead.* When the Marion cemetery, known as Forest Glen, was organized in 1933, the record discloses there was no thought or intention of developing any other cemetery in July 1933, after Marion was completed. (pp. 3458, 4799, 4800 R., Transcript.) Springfield, Ohio cemetery was then planned and developed, known as Glen Haven. That was in 1934. In 1936 a similar cemetery was planned and developed near Columbus, Ohio, known as Glen Rest. All such cemeteries were known as Memorial Parks, equipped with Chapel and community meeting house, fine pipe organ, a tower with chimes, operated from the pipe organ and lakes, trees, fountains, foliage, drive-ways and head-markers only. Each cemetery was substantially com-

pleted and developed. The contracts, noted above, of Forest Glen, Inc. with each cemetery, were all legal contracts, their legality never having been questioned or successfully attacked.

In November 1940, an indictment was returned against Robert Marshall and the attorney, and the auditor for Forest Glen, Inc. and for the cemeteries, and 41 salesmen, including appellants.

The first nine counts set forth an alleged scheme to defraud was formed by all of the defendants July 1, 1933 (p. H Transcript opening statement Dist. Atty.), and use of mails. (Sec. 338, Title 18, U. S. C. A.) The tenth count alleged all of the defendants formed a conspiracy July 1, 1933, to use the mails to carry such scheme into effect. (Sec. 88, Title 18, U. S. C. A.)

To that indictment, Motions for Bills of Particulars, Motions for separate trials and Demurrers were filed by each appellant. Motions were made at the end of the Government's case and at close of all the testimony to dismiss the defendants and each of them and direct a verdict of acquittal. The jurisdiction of the Court under the indictment was questioned at the outset of the trial. (p. A-14, Transcript.)

The District Court overruled and denied all of these pleadings and Motions. The trial began September 23, 1941, and was concluded April 7, 1942, when a verdict was returned. The trial actually ended on April 1, 1942, the jury deliberated for six days.

Marshall, the Attorney and all salesmen were convicted. The Auditor was acquitted. Immediately after conviction the Court stated "he would consider a Motion for a New Trial filed by each defendant and that the same was overruled," no opportunity being offered to submit anything in support thereof. Having appealed to the United States Circuit Court of Appeals for the Sixth Circuit in Causes Nos. 9241, 9242 and 9243, the judgments of

conviction as to them were affirmed and their Petitions for Rehearing in the Circuit Court were denied on February 9, 1944.

The evidence relied upon for conviction, with some individual exceptions, all related to selling cemetery sections according to applications—plans—terms—agreements and instructions as devised by Marshall and issued by the managing officers and employers of appellants, as stated by the Government in its opening statement to the Jury. (p. K. Transcript.) The Court of Appeals found and the evidence showed that Robert Marshall devised, originated and executed whatever plans and schemes existed with reference to the establishment, procuring of lands, incorporation of companies, development and financing of the enterprises. He caused Forest Glen, Inc. to be organized. Forest Glen, Inc. was the sales organization through which Marshall held title to the land developed into cemeteries.

An opinion of the Attorney General of Ohio (p. 3420 Transcript Def. Ex. 1103) had previously held that such a contract as existed between Forest Glen, Inc. and the cemeteries, between a sales organization and the Trustees of a cemetery was legal. The salesmen were licensed under an opinion of the Attorney General of Ohio (Def. Exh. 1246, pp. 4625-4626 Transcript) to sell the sections in these cemeteries as real estate and during the period of the development of the Parks and the sale of sections, the entire enterprise, the contracts and methods of financial operation were investigated by the Securities Division of the State of Ohio and the stamp of approval of that Department was placed upon them. The Trustees who served on the Boards of Trustees of the three Memorial Parks and of the sales organizations were reputable, outstanding men in the communities in which the Parks were located and naturally inspired confidence in the public and salesmen. They were in control of the Parks after the alleged plans and scheme were alleged to have been devised by Marshall and during the

entire period of time covered by the Government's charge of mail fraud and conspiracy. Only one of these men was indicted, viz., the attorney for the enterprise, who was convicted, and given a sentence which was suspended upon the payment by him of a $5,000.00 fine. These Trustees took control of the plans and development before the salesmen were called in and employed. Robert Marshall was the man behind the promotion, development and management of the entire undertaking. He conceived the idea of building the Parks and devised the methods for raising the money to finance their development. He controlled the brokers and the salesmen. Everything was done under his supervision. The salesmen admittedly had nothing to do with the control or operation of the business, the forming of the plans, the books, financing, banking or correspondence of the corporations or management.

During the period of time from November 1933 to May 16, 1938, $424,365.59 was spent in the development of the three beautiful cemeteries. Sections were sold and money was borrowed by Forest Glen, Inc., not the cemeteries for investment purposes to develop the cemetery, aggregating $1,840,582.21. A large force of retail salesmen was organized. Sections were sold at retail, aggregating the sum of $1,332,880.66 (p. 2570 Transcript). Forest Glen, Inc. owed the investors, etc. $1,036,432 in May 1938—at time receivership was sought according to Circuit Court of Appeals decision. It was out of the sales of sections at retail by which it was intended and agreed to repay the wholesale investors and lenders according to the contracts made with them. $344,586.00 (pp. 2487, 2735 Transcript) of this amount had been paid in by May 18, 1938, at which time there was due Forest Glen, Inc. on retail sales $659,000.00. $132,043.92 was paid into the Endowment Funds. In addition there was paid salesmen commissions and operating and advertising expense amounting to several hundred thousand dollars.

14000 sections (p. 2569 Transcript) were sold at retail for purpose of paying purchasers of sections at wholesale and borrowings. All of the foregoing was a part of the Government's case as testified by their expert auditor O'Brien. All these sections were sold in four and one-half years. 33000 sections remained to be sold for the benefit of the cemeteries.

During this period of time investors were paid the sum of $803,950.73. Part of this money represented money borrowed. The salesmen defendants were paid only on a commission basis of 15% of sales.

Litigation was commenced against Robert Marshall by a lone investor—seeking a receivership in the first part of 1938 resulting in his being divested of any control over the Parks on May 16, 1938. There were no widespread complaints made. The three Memorial Parks remain in existence today, serving the useful purposes for which they were developed. As the indebtedness to creditors other than investors and lenders is relatively small the investors all have valuable constructive holdings in these Parks. The Sections were selling at the time of the trial for $125.00 to $500.00 for burial purposes merely. Sections at wholesale sold for $50.00.

At the trial the Court refused to admit evidence offered by various appellants material to the issues raised by the indictment and plea of not guilty. The trial court refused to permit the testimony of the Prosecuting Attorney of Franklin County (pp. 4542, 4555, 4560, 4573, Transcript), that upon complaint made to him he had investigated this same cemetery project and that he had told Holcombe and one other salesman who questioned him before they became salesmen, that he had investigated the matter, found it legal and nothing wrong, all going to the issue of good faith and criminal intent. The record fails to show affirmatively that such appellants were not prejudiced thereby.

At the trial the Court admitted testimony, over objection, which was immaterial, and which obviously was irrelevant and prejudicial. The record does not show affirmatively that appellants were not prejudiced thereby.

At the trial, the Court admitted documentary evidence against appellants which it was contended by the Government was material, and which was prejudicial to some of the appellants, when no witness was on the stand, in violation of Article VI of the Amendments to the United States Constitution. (pp. 3353, 4089 Transcript—Government Exhibits 967-C and 957A to V, pp. 2816, 2827, 2831, Transcript affecting Holcombe.)

One of appellants, W. N. Clark, invested $30,000.00 in sections at wholesale. Other salesmen and their families invested thousands of dollars in sections—all on the same terms as given other investors.

The decision of the Court of Appeals discloses that it relied upon the testimony of Robert Marshall in his own defense to establish *his* scheme to defraud and *his* conspiracy. (pp. 4114, 4121, 4118, 4119, Transcript.) This was after the Government had failed to establish all this on its own case and after Motions and Demurrers were made and filed for a directed verdict before the case ended for failing to do this (pp. 2248A to 2248D, Transcript), and the Motion and Demurrer of Record at the close of the Government's case, upon the same grounds. All were denied. The Court stating that the evidence must be considered most favorable to the Government, even though consistent with innocence. This was fundamental error.

The following petitioners were convicted, with others, not appealing, on all ten counts. Their sentences are set opposite their names.

Name	*Count*	*Sentence*	*Fine*
Wm. N. Clark	10	5 years	$1000.00
Dan S. Riggle	10	3 "	1000.00
Willard S. Holcombe	10	3 "	1000.00
Earl Pardee	10	3 "	1000.00
G. F. Buck	10	3 "	1000.00
Carl Bemman	10	3 "	1000.00
George Reinwald	10	6 "	1000.00
Earl L. Holliday	10	5 "	1000.00
R. C. Deck	10	4 "	1000.00
A. L. Mallott	10	3 "	1000.00
W. Hal Marshall	10	3 "	1000.00

The following petitioners, with others not appealing, were convicted on the first count only and acquitted on the other 9 counts, including the 10th count known as the conspiracy count.

Name	*Count*	*Sentence*	*Fine*
Byron L. McClure	1	1 year and a day	$1000.00
~~Paul Secord~~	~~1~~	~~1 year and a day~~	~~1000.00~~
S. C. Neidigh	1	1 year and a day	1000.00
Hiram Berry	1	1 year, 18 months	1000.00
E. G. Blue	1	1 year, 18 months	1000.00

A number of salesmen, five, were acquitted on all counts except the first. Their convictions were reversed by the Circuit Court of Appeals. However, they sold on the same terms and did substantially the same things as those salesmen did, who were convicted on all ten counts. The alleged chief offenders, as claimed by the Government in the indictment and at the trial and in its opening statement to the jury, were convicted on all ten counts. Their sentences, except Marshall who died before sentence, and whose death was forecast by his doctors at the start of the trial, if he had to proceed (pp. 8, 14 A, 9-B-14B, 31 Transcript), were suspended on the payment of heavy fines.

The Court of Appeals did not segregate the salesmen and specify the circumstances evidencing their individual guilt regardless of the presumption of innocence but said

"some were guilty of one type of conduct, some of another; Marshall may have imposed on some of the salesmen and some may have acted in good faith."

Yet—affirmed the conviction of all appellants, notwithstanding they may have acted in good faith.

The errors upon which your Petitioners claim to be entitled to a reversal are set out in the assignment of errors set forth in the Brief filed herein.

The Court of Appeals in its Decision said:

> "As charged by the Government the fraud consisted of a scheme in which cemetery lots were sold to the public for purposes of investment." 138 Fed. 2nd 351-353.
>
> "The conspiracy consisted of a scheme to defraud people in the sale of cemetery lots." 138 Fed. 2nd 360.

The District Court (p. 5332, Transcript) *charged the jury that the sales of the sections by appellant salesmen was not in and of itself illegal and that the execution of the applications, contracts, deeds evidencing the right to use such sections for the burial of the dead, was not illegal.*

The Government did not state in the indictment that such sales and papers were illegal, neither did they make any such claim at the trial. They said the sales of sections for investment and resale for utility to pay a profit to investors was not unlawful. (p. 4368, Transcript.)

The Circuit Court of Appeals relied upon the testimony of Marshall to establish what it conceived to be the scheme to defraud and affirm the conviction of appellants. This action was prejudicial to appellants under the demurrers and motions filed at end of Government's case for a directed verdict. The Trial Court in effect held appellants, who did not call Marshall, could not cross examine him and were bound by his testimony. This was prejudicial error. (pp. 4114-4119, Transcript.) (See 138 Fed. 2nd, pp. 358, 361 also.)

It was admitted and conceded by the Government and the Court below, that the case, as against the appellant salesmen, rested solely on circumstantial evidence and that their only compensation was their commission.

The District Court admitted, that circumstances which the Government maintained was material and which were relied upon by the jury and the appellate court—were susceptible of an inference of innocence. (p. 2821, Transcript.)

Both the District Court, over the objection of appellants, and the Court of Appeals said that notwithstanding such circumstances were susceptible of an inference of innocence, that the same must be submitted to the jury, that it was not a question of law for the Court—requiring a verdict of acquittal. (pp. 1823-24, Transcript.)

The District Court charged the jury, however, that where a circumstance was susceptible of an inference of innocence, *the jury must resolve* (pp. 5308-5311 Transcript) the inference in favor of innocence and not guilt, but left the question to the jury.

During the trial a persistent effort was made by one of the appellants, pp. A-16, 17, 18-4359, 4365, 4799, 1714, 4367, pp. 1822, 4966, 4968, which the trial court said would run in favor of all defendants, to compel the Government to state what the alleged scheme to defraud was, i.e., whether they claimed that the sales and papers themselves were illegal under Ohio law or whether the illegality and fraud consisted in something else, some other facts not alleged. The Court refused to compel the Government to so state and appellants never knew, what exactly it was, with which they were charged as the basis of the alleged scheme to defraud and the alleged conspiracy until the Circuit Court of Appeals defined it as set out herein.

In the Court of Appeals, the Government, after being asked by the Court of Appeals, what the scheme to defraud was and what the conspiracy was, said, in their reply brief, p. 2,

*"We have experienced the inevitable difficulty of * * * summarizing the evidence or adequately describing the scheme to defraud—as it affected the individual appellants."*

*"These practical difficulties * * * result from the fact that* **the scheme** *and the evidence thereof* **are spread over five thousand odd pages of the record** *and* **several thousand exhibits."**

The Government and the Court of Appeals relied solely on what the salesmen did as salesmen in securing applications and making such sales and as substantially incorporated in the documents which the District Court charged the Jury were not unlawful, to establish knowledge and an agreement to enter the scheme and agreement to enter such alleged conspiracy.

The Court of Appeals did not find that Marshall conspired with anyone, either as to said alleged scheme or as to the intent to use the mails to carry out such alleged scheme. The Court found that Marshall alone devised the scheme as the Court defined it, and then that it became a conspiracy because the salesmen sold under the applications, contracts, deeds and plans promulgated by him and by Forest Glen, Inc., which corporation the Court of Appeals said, "Marshall caused to be incorporated," none of the salesmen were in any wise interested or a part of that corporation, or any other corporation which Marshall caused to be formed.

The District Court charged the jury that they were not permitted to discuss the fact the defendants did not take the stand. An affidavit was filed in the Circuit Court of Appeals and after appeal, a motion for a New Trial was filed in the Circuit Court of Appeals, under Rule, based upon the fact alleged that the jurors spent a day or more discussing the fact that defendants did not take the stand, that therefore, they must all be crooks and further stating that the trial cost about $500,000.00 and that they would not dare bring in a verdict of acquittal. The Court

of Appeals did not categorically pass upon that Motion and Affidavit. (*Mattox vs. U. S.* 146 U. S. 140, 36 L. Ed. pp. 920, 921.)

The Government admitted that the books showed that Forest Glen, Inc. intended to continue to operate as a going concern, and to sell sections for utility purposes. (p. 3306, Transcript.)

The trial court ruled in passing on the motions and demurrer at the end of the Government's case, that the circumstances and evidence must be given the most favorable construction in favor of the Government. The effect of that ruling was to upset, neutralize and nullify the presumption of innocence. The Court made this ruling after conceding that some of the circumstances relied on for conviction are consistent with innocence. See pp. 2820, 2821, 1822, 1924 and 3380, Transcript.

JURISDICTION.

Appellants rely on Section 240 as amended, Judicial Code, Title 28, U. C. S. A., Section 347-A and Rule XI—Rules of Practice as promulgated by the United States Supreme Court to govern Criminal Procedure after conviction.

QUESTIONS PRESENTED.

The propositions herein involved are as follows:

1. The Government contended that the circumstances showing that some salesmen defendants represented to some investors that high returns on the investments would be made by them, that they would double their money, as embodied in the written contracts made with Forest Glen, Inc. which was limited to Marion cemetery, that the enterprise was a safe investment. In one or two instances a salesman stated on his own responsibility that the Government was back of the project, there being no proof or finding that such a statement was a part of any plan devised

by Marshall. That many of the investors were laymen, old people, and inexperienced in financial matters, and the further circumstance that they did not receive back the amounts promised at the time of the alleged receivership, May, 1938, that the sections were worthless, warranted a submission of the case to the jury and was sufficient to support the conviction, notwithstanding the presumption of innocence. (There is no evidence in the record to support the charge that the parks or sections are worthless. There is evidence that both are very valuable.)

The defendants contended that the circumstances showing the building and development of three beautiful parks, the expenditure of huge sums of money therefor, the repayment of a large amount of money to investors, the approval of the plan of financing by the Securities Department of the State of Ohio, the fact that the salesmen did not formulate the scheme of financial operations nor have any control over same, together with the circumstance that Robert Marshall alone devised and dominated the entire development, and that none of the alleged representations so far as the salesmen were concerned were illegal or fraudulent in themselves, were of such overwhelming weight that, taken with the presumption of innocence that surrounded the salesmen defendants, that the case as to them should have been taken from the jury and a verdict of not guilty directed. This was based on the simple rule of criminal jurisprudence that where all the circumstances relied upon for conviction are as consistent with innocence as with guilt, the defendants are entitled to an acquittal and the Court and Jury are imperatively required to give that verdict.

2. The salesmen defendants contend they were denied their right to a speedy trial as guaranteed by Article VI of the Constitution of the United States and as a result *no trial* as contemplated by our fundamental law was had by them.

3. Since the Government conceded that the alleged scheme to defraud is spread over 5000 odd pages of testimony and not stated in the indictment and since appellants did not know what it was with which they as salesmen were charged, until the Court of Appeals rendered its decision —were the appellants prejudiced and denied their constitutional rights of due process of law and to be informed of the charge against them under Amendments V and VI, United States Constitution?

If error appears on the record in a criminal case, involving an indictment under Sections 88 and 338, Title 18, U. S. C. A. and a plea of not guilty wherein the Trial Court rejected evidence offered by the defendant material to his defense and the record does not show affirmatively that such defendant who was convicted by a jury, was not prejudiced thereby and the Circuit Court of Appeals affirms said judgment of conviction, is such defendant entitled to a reversal and a new trial? *U. S. v. Wilkinson,* 12 How. (U. S.) 246; *Vicksburg vs. O'Brien,* 119 U. S. 99, 103; *Crawford vs. U. S.,* 212 U. S. 183.

4. Was it reversible prejudicial error for the trial court to overrule and deny a demurrer to such evidence filed by the defendants at the end of the Government's case, and again at the end of all of the evidence?

5. Was it reversible prejudicial error and a denial of due process of law when the Trial Court refused to permit the Prosecuting Attorney of Franklin County to testify that he had told some of the salesmen—before they commenced selling that he had investigated the cemetery projects and had found there was nothing wrong—this going to the issue of good faith thereby "preventing the first step in his defense"? *Derry's Lessee vs. Gray,* 5 Wall. 795, 808.

6. If the only circumstances upon which the jury rely to convict and the appellate court to affirm as stated in its decision, show nothing but participation in selling cemetery sections which sales under applications, contracts

and deeds have been declared by the Court not illegal, under the presumption of innocence, is that sufficient to support a conviction in the admitted absence of any direct proof of knowledge or an agreement to enter a scheme to defraud or an agreement to enter a conspiracy to commit an offense against the United States? Does mere participation in doing something which assists some one in carrying out a scheme to defraud, without proof or circumstances importing an agreement, warrant a conviction under Section 88, or 338, Title 18, U. S. C. A.? *Falcone vs. U. S.*, 311 U. S. 205, 210, 211; *Vernon vs. U. S.* (8 C. C. A.), 146 Fed. 121, 123, 124; *U. S. vs. Falcone*, 109 Fed. 2nd, 579, 581; *Bebardi vs. U. S.*, 287 U. S. 112; *Linde vs. U. S.*, 13 Fed. 2nd 59; *Baraventura vs. U. S.*, 15 Fed. 2nd, 494, 495; *Dickerson vs. U. S.*, 18 Fed. 2nd (C. C. A. 8th), 887, 893; *Vernon vs. U. S.*, 146 Fed. 121, 123, 124 (8th Cir.).

7. The ruling of the trial Court on the motions for a directed verdict at the end of the Government's case and on the demurrer, that the most favorable construction in favor of the Government, must be given to the evidence and circumstances thereby submerging and nullifying the presumption of innocence, which remains with the accused at all times until convicted beyond a reasonable doubt, is without support in authority and is in violent conflict with the applicable decisions of this Court.

It creates so important a Federal Question as to unqualifiedly invoke the revisory and supervisory powers of this Court.

Kirby vs. U. S., 174 U. S. 47, 55, 56;
Coffin vs. U. S., 156 U. S. 432, 459, 461.

8. Was it the duty of the Circuit Court of Appeals upon an appeal from a conviction of a defendant under such state of the record, to reverse such conviction and remand for a new trial, or enter judgment for such defendants?

9. Was it prejudicial, reversible error for the trial court to admit evidence contained in paper writings, which it was contended by the Government was material to issues, when there was no witness on the stand and no opportunity for cross examination and when there was a conviction of such defendant or defendants, was such defendant denied his constitutional rights under Article VI of the Amendments of the United States Constitution? *Motes vs. U. S.*, 178 U. S. 458, 474; *Kirby vs. U. S.*, 174 U. S. 47, 55, 56; *Mattox vs. U. S.*, 156 U. S. 237, 242.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Your petitioners contend that a Writ of Certiorari should be allowed and that the decision of said Circuit Court of Appeals should be reversed by this Court for these reasons:

1. Under the applicable decisions of this Court on the record and of the Circuit Court of Appeals, the alleged scheme to defraud under this indictment can exist only on the basis that it was the intention of Robert Marshall and anyone who conspired with him not to carry out his contracts and agreements. Both the Government and the Circuit Court of Appeals concede in words or in effect, that there is no direct testimony of any agreement on the part of the salesmen to knowingly enter an alleged scheme to defraud or intending to defraud, or the alleged conspiracy to use the mails to defraud. The case against petitioners and each of them was predicated solely on circumstantial evidence. The Circuit Court of Appeals predicated its conclusions and affirmance of the convictions on circumstances which show nothing more than promoting the sale of sections which resulted in the execution of the plans, applications, contracts, deeds, documents publicly announced by which money was raised for developing the cemeteries, and in paying investors according to the terms of the contracts,

and payment of commissions, expenses, etc., which on the record are all consistent with innocence. In holding that the Trial Court did not err in submitting this case to the jury when the overwhelming weight of circumstances and the only circumstances relied upon to convict and to affirm that conviction, showed that the acts of the salesmen were as consistent with innocence as with guilt, the Circuit Court decided a very important question of general law in a way untenable and in conflict with the overwhelming weight of authority as announced by the Circuit Court of Appeals and the Supreme Court of the United States, as will be shown in our brief in support hereof. The question is of sufficient importance to compel the attention of this Court by Writ of Certiorari, since the United States Supreme Court well said:

> *"The enforcement of this presumption lies at the foundation of our criminal law."*

See

Sullivan vs. U. S., 283 Fed. 865, 868 (8th Cir.);
Durland vs. U. S., 161 U. S. 306, 313, 314;
Coffin vs. U. S., 156 U. S. 434, 452, 461;
U. S. vs. Ross, 92 U. S. 281, 283, 284.

2. The Circuit Court of Appeals in sustaining the conviction of the defendants sanctioned a departure by the Lower Court from the accepted and usual course of judicial proceedings calling for an exercise of this Court's power of supervision. By so doing, it has also decided an important question of Federal Law which has not been but should be settled by this Court. The Trial Court in this case denied separate trials to the defendants and then required them to attend Court at a place foreign to their places of residence for a period of approximately six and one-half months. During this period of time the hours of trial proceedings as sanctioned by the Trial Court were continuously from 9:30 A. M. until 1:30 P. M. The Trial

Court permitted the Government attorneys to introduce and read in evidence hundreds of repetitious matters that were wholly unnecessary to a determination of the issues and to otherwise drag the case to an interminable length. A conservative estimate is that the trial of this cause could have been concluded in one-third of the time taken by the Government, had proper hours for trial proceedings been kept and had the Government been required to proceed with dispatch in the introduction of its evidence. The record of 5400 pages shows this. Should this Decision be allowed to stand, the practice of a prosecutor in purposefully dragging out the presentation of evidence in a criminal case and thus denying to the accused his right to a speedy trial is condoned and sanctioned. In our brief we point out the raising of this question and enough of the proceedings to show this point.

The Petitioners cannot make an affidavit that would permit them to proceed herein strictly *in forma pauperis*, but Petitioners are also without sufficient funds with which to have printed in this Cause the Record and the Transcript of the Testimony and evidence adduced in the Trial Court. The United States Circuit Court of Appeals permitted the Petitioners as upon *forma pauperis* to file a typewritten Transcript of the record and testimony and evidence adduced, in the Court of Appeals, and the Court of Appeals considered the case on the typewritten transcript of the Record and Proceedings at the trial. A Motion is, therefore, attached to and made a part of this Petition praying that this Honorable Court grant Petitioners leave to proceed herein on the certified typewritten transcript of the Record and testimony and evidence adduced in the Trial Court, and is transmitted to and filed herewith, with the Clerk of this Court.

3. The conviction of these appellants who admittedly only acted in the capacity of salesmen and had nothing to do with the administrative affairs of any of the

business involved, and the later affirmance of their conviction by the Court of Appeals establishes a precedent, whereby a prolonged discussion in the Jury room of extraneous matters which they were particularly warned not to discuss would be given at least a tacit approval, by the United States courts. These matters not having been in the record in any proper form and the trial judge having particularly warned against their discussion, they became matters entirely foreign to the record and were highly prejudicial. The motion for a new trial having been filed supported by affidavit has never been categorically passed upon by the Court of Appeals.

4. The indictment in this case was required to state an overt act as to one or more of the defendants. All overt acts were of the same nature and merely stated that the defendants had had conversations. We quote the allegation in the indictment relating to Willard S. Holcombe:

> "That the defendant, Willard S. Holcombe, on or about June 20, 1937, called on Frank Price, Newark, Ohio, and had a conversation with him."

This would seem not to be the charge of any overt act because it does not appear that the conversation pertained to any misrepresentation, or to any alleged scheme to defraud or to any conspiracy charged.

The insufficiency of that charge of overt act is clearly apparent when on reading the record, we find that that conversation with Frank Price contained no element of misrepresentation. There was therefore not only an insufficient charge of overt act, but a failure of proof of any acts which would constitute an overt act under this indictment. (pp. 2259-2269 Transcript.)

5. When the principal actor in this prosecution, Robert Marshall, who devised the alleged scheme to defraud as stated by the Court of Appeals, was called by his counsel for examination, Mr. Bigger, representing the salesmen, moved (pages 4114, 4118, 4121 of transcript) that:

"Thereupon Mr. Bigger made the following motion: I move the court instruct the jury that the testimony and evidence adduced through this witness, Mr. Marshall, cannot be used against any other defendant in support of the government's case and cannot be used unless and until any other defendant avails himself of his rights and puts his defense on.

"Thereupon the motion was overruled and exception granted as to all counsel."

The court then on page 4456 of the transcript laid down the rule:

"In the absence of anything in the contract (presumably contrary), we will lay down the rule that will govern in this case. Any witness called on behalf of the defendant or defendants, or any defendant, may be examined as ordinarily he would be as a witness on the behalf of the defendants. Any other counsel for defendants may further examine him as a witness on behalf of the defendants."

6. The record shows that the appellant Holcombe had honestly and industriously endeavored to learn whether there was anything unlawful in this transaction and had been advised by the Prosecuting Attorney of Franklin County, who investigated it, that it contained no unlawful element and no reason why he should not go ahead and sell. The testimony of the Prosecuting Attorney would have had a direct bearing upon the criminal intent and good faith of Holcombe, yet he was denied the benefit of that testimony. He was denied proof in the first step in his defense. The rejection of that testimony was prejudicial error, it was a denial of due process and was a departure from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's power of supervision.

The three foregoing reasons all constitute a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding that Court to certify to and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases of E. G. Blue, *et al.*, Appellants, vs. United States of America, Appellee, Case No. 9241; W. N. Clark, *et al.*, Appellants, vs. United States of America, Appellee, Case No. 9242 and Earl Pardee, *et al.*, Appellants, vs. United States of America, Appellee, Case No. 9243, and that said judgment of the said United States Circuit Court of Appeals be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

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WILLIAM N. CLARK,
WILLARD S. HOLCOMBE,
DAN S. RIGGLE,
BYRON L. MCCLURE,
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